It’s not about pluralism. It’s about power politics!

Marten Breuer 2015-03-16T13:15:18

Much has been said already on Daniel Halberstam’s blog entry and his corresponding article. Therefore, I may be brief.

To begin with, I have problems with Daniel’s concept of ‘constitutional pluralism’. If I understand it correctly, this concept has been developed by him in order to explain the ECJJ’s *Kadi* judgment. Analysing the relationship between the ECJ and the UN Security Council is one thing – but the EU acceding to the European Convention on Human Rights is definitely something different. In the case of the Convention, the demand for pluralism has found an in-built mechanism, namely, the margin of appreciation doctrine. Apart from that, the Convention aims to secure a Europe-wide minimum standard in human rights. As a matter of principle, this leaves no room for pluralism. One might argue that a particular judgment of the ECtHR has not duly respected the margin of appreciation. However, this does not call into question the general principle that the minimum standard as established by the ECtHR has to be respected by all States Parties.

According to Daniel, the outcome of Opinion 2/13 was predictable against the background of *Kadi*. I have argued in an article to be published in issue 3 of Europarecht (as now Thomas Streinz does on this blog independently) quite to the opposite. It would have been in line with the ECJ’s dualistic reasoning in *Kadi* to hold that any indirect finding of the ECtHR on questions of Union law is restricted to the international law sphere and has no binding effect within the Union legal space. This is true for the plausibility check as part of the co-respondent mechanism: Becoming a co-respondent produces effects for the EU only on the Convention plane. A plausibility check by the ECtHR does not affect the ECJ’s last word in terms of Union law. This is equally true for the ECtHR’s power – criticised by the ECJ – to define the responsible party under the co-respondent mechanism. Again, this produces effects only in terms of international law. Were the ECtHR to hold that the EU is solely responsible but in the ECJ’s view, the matter fell within the Member States’ exclusive competence, no conferral of powers would take place within the Union legal sphere. Rather, the Member States would be obliged (under Article 4(3) EU) to implement the ECtHR’s judgment instead of the Union. International law and Union law are kept separately.

I would even go so far (although I am aware that this is a minority position) to hold that Article 344 TFEU is not in the way of inter-state complaints (Article 33 of the Convention) amongst EU Member States or in the relationship between the EU Member States and the Union. Article 344 TFEU seeks to secure the uniform interpretation of Union law. The ECJ cannot claim, however, to be the ultimate arbiter in Convention matters. The exclusive competence of the ECJ under Article 344 TFEU, therefore, is restricted to interpreting the Convention *as being part of*

Union law. This is not to say that the ECJ also has the ultimate word *in terms of international law*. The uniformity which Article 344 TFEU aims to secure is in no way affected by the ECtHR's competence to decide on the interpretation of the Convention. Quite to the contrary: If the ECJ were to have the last word in inter-state complaints, the very same matter could be brought before the ECtHR by way of an individual complaint. Uniform interpretation is endangered, not enhanced by the ECJ's desire to retain the last word in interpreting the Convention.

This leads me to the concept of autonomy. As Tobias Lock has rightly pointed out, the concept of autonomy underlying Opinion 2/13 goes far beyond what has previously been acknowledged. And Sionaidh Douglas-Scott has reminded us of the origin of this concept in *Costa v ENEL*. I might add just one aspect: The rationale of *Costa v ENEL* was to prevent Member States from unilaterally suspending Union law by passing conflicting national legislation. The aim was to secure for a uniform application of Union law. But here again, we find that the uniform application of Union law is in no way endangered by the ECtHR's competence to interpret the Convention. To the contrary, with the EU acceding to the Convention, all partners – the Union itself as well as its Member States – would underlie the same criteria in terms of human rights law.

The ECJ appears eager to be in the centre like the spider in the spider's web. This becomes particularly clear from the MOX Plant saga (to which the ECJ refers in its Opinion). In that case Ireland, under the UN Convention on the Law of the Sea (UNCLOS), had instituted proceedings against the United Kingdom under this very same Convention. After the EU Commission had initiated an infringement procedure under what is now Article 258 TFEU, the UNCLOS arbitral tribunal stayed proceedings and waited for the outcome of the infringement procedure. The ECJ found Ireland to have acted in violation of Union law. If we accepted this case as a blueprint, the ECJ gained the power to decide on other international court's jurisdiction. This, however, would be contrary to the very concept of international adjudication since each international court and tribunal has the power to define the limits of its jurisdiction autonomously. Therefore, my argument is that Opinion 2/13 is not about pluralism (and, indeed, not about the autonomy of Union law). It seeks to secure the ECJ's last word in Convention matters. As such, it is an expression of power politics.
